Ray bin Solis v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–144–06 OF 2012
ZAHARAH IBRAHIM, MOHAMAD ARIFF AND VARGHESE GEORGE JJCA
19 JANUARY 2015

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appeal against decision of High Court — Offence of murder — Accused person stabbed deceased and caused death — Defence of self-defence — Whether probable — Whether prima facie case established — Non-calling of witness — Whether non-calling detrimental to prosecution's case — Whether conviction and sentence safe

This was an appeal against the conviction and death sentence by the High Court. The deceased was a tenant of a room at the ground floor of the house owned by PW9 where the incident had taken place. PW9 lived on the upper floor and had heard a cry for help. She went down the stairs and saw the deceased holding his right chest and covered with blood. The deceased at that point told her that 'Ray' ('the appellant') had stabbed him. The appellant who stayed at PW8's house fled the scene of the crime but was later apprehended by the police. The deceased died and post-mortem revealed that the cause of death was due to massive loss of blood as a consequence of the stab wound on the right front of the chest which pierced the right lung, liver and colon. The stab wound injury suffered by the deceased was fatal and consistent with that caused by a sharp weapon probably one which had a double edge such as a *keris* or spear. In his defence, the appellant claimed that on the fateful evening, he had been drinking with PW8 and some friends at PW8's house. He had then gone over to the PW9 to see a lady known as 'Ria' and was then invited by the latter to join for dinner. 'Ria' was preparing dinner, when allegedly, the deceased, who was in the living room, suddenly attacked him. According to the appellant, he then grabbed a piece of wood to defend himself from the deceased when he was pushed against a wall. He was then chased out of the house and he threw away the piece of wood. The appellant's version was essentially that he had been merely defending himself. He denied he went there armed with a spear with intention to find the deceased. The High Court had, at the end of the trial, held that the defence had not cast any doubt on the prosecution's case. Hence the present appeal. The appellant argued that there was no direct evidence implicating the appellant to the commission of the crime; the trial judge was wrong in admitting and/or relying on the dying declaration or statement allegedly made by the deceased to PW9; the prosecution had failed

to adduce a crucial witness, Ria, who was at the house where the alleged stabbing of the deceased took place.

Held, dismissing the appeal and affirming the conviction and sentence.

(1) The drinking by the appellant was voluntary and with the other surrounding evidence, were insufficient to establish a defence of intoxication under ss 85(2) and 86(2) of the Penal Code. The appellant had also failed to discharge the onus placed upon him under s 105 of the Evidence Act 1950 to prove the state of intoxication such as to negate the appellant's intention or mens rea to cause the fatal injury the deceased had succumbed to (see para 29).

(2) There was no evidence that the deceased had made any threats against the appellant other than a mere verbal quarrel two weeks before the stabbing incident, such as to cause the appellant to be defensive with the deceased (see para 30).

(3) It was not shown why or on what reasonable basis PW9's testimony relating to the dying statement made by the deceased to her ought to have been disregarded by the judge. The court had held her to be a reliable and consistent witness without any predisposed grudge or ill will against the appellant. The trial judge had not misdirected himself in law or on the facts in placing reliance on the dying statement made by the deceased to PW9 which not only identified the appellant as the person who inflicted the injuries, but also the 'transaction' — the stabbing — that led to injuries that subsequently resulted in the deceased's death (see para 41).

(4) Even by the appellant's own evidence in defence, Ria was in the kitchen when the admitted scuffle between the appellant and the deceased had taken place. The investigation by the police immediately after the incident as disclosed by the prosecution witnesses was that this witness was in the kitchen when she heard the deceased crying out after being stabbed. In the circumstances, Ria was not a critical or crucial witness to the happenings at that night in or about the living room of the premises. Any evidence she would have given would not have had any material consequence on the ultimate decision reached by the trial judge in the matter (see paras 43–44).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap sabitan dan hukuman mati oleh Mahkamah Tinggi. Si mati merupakan penyewa sebuah bilik di tingkat bawah rumah yang dimiliki oleh PW9 di mana kejadian telah berlaku. PW9 tinggal di tingkat atas dan telah mendengar jeritan meminta pertolongan. Dia menuruni tangga dan melihat si mati memegang dada kanannya dan dipenuhi darah. Si mati pada masa itu memberitahunya bahawa 'Ray' ('perayu') telah menikamnya. Perayu yang tinggal di rumah PW8 telah melarikan diri dari tempat kejadian jenayah

itu tetapi kemudian telah ditangkap oleh polis. Si mati telah meninggal dunia dan bedah siasat menunjukkan bahawa kematian adalah akibat kehilangan darah yang banyak disebabkan luka tikaman pada bahagian depan sebelah kanan dada yang menusuk paru-paru, hati dan kolon sebelah kanan. Kecederaan luka tikaman yang dialami oleh si mati adalah memudaratkan dan konsisten dengan yang disebabkan oleh senjata tajam yang mungkin mempunyai dua sisi seperti keris atau lembing. Dalam pembelaannya, perayu mendakwa bahawa pada petang itu dia sedang minum arak bersama PW8 dan beberapa rakan di rumah PW8. Dia kemudian telah pergi kepada PW9 untuk berjumpa seorang wanita bernama 'Ria' dan kemudian telah dijemput oleh Ria untuk makan malam bersama. 'Ria' sedang menyediakan makan malam, apabila dikatakan, si mati, yang berada di ruang tamu, tiba-tiba menyerangnya. Menurut perayu, dia kemudian telah mengambil sebatang kayu untuk mempertahankan dirinya daripada si mati apabila dia ditolak ke dinding. Dia kemudian dikejar keluar dari rumah itu dan dia telah mencampakkan batang kayu itu. Versi perayu adalah pada dasarnya dia hanya mempertahankan dirinya. Dia menafikan telah pergi ke situ dengan bersenjatakan lembing dengan niat untuk mencari si mati. Mahkamah Tinggi telah, di akhir perbicaraan, memutuskan bahawa pembelaan tidak menunjukkan apa-apa keraguan atas kes pendakwaan. Justeru rayuan ini. Perayu berhujah babhawa tiada keterangan langsung yang membabitkan perayu dengan perlakuan jenayah itu; hakim perbicaraan terkhilaf kerana menerima dan/atau bergantung kepada deklarasi mati atau kenyataan sebelum yang dikatakan dibuat oleh si mati kepada PW9; pendakwaan telah gagal mengemukakan saksi penting, Ria, yang berada di rumah itu di mana berlaku penikaman si mati yang dikatakan itu.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Arak yang diminum oleh perayu adalah secara sukarela dan dengan keterangan sekeliling lain, adalah tidak mencukupi untuk membuktikan pembelaan mabuk di bawah ss 85(2) dan 86(2) Kanun Keseksaan. Perayu juga telah gagal melepaskan beban yang terletak ke atasnya di bawah s 105 Akta Keterangan 1950 untuk membuktikan keadaan mabuk untuk menafikan niat atau mens rea perayu yang telah menyebabkan kecederaan maut kepada si mati (lihat perenggan 29).

(2) Tiada keterangan bahawa si mati telah membuat apa-apa ugutan terhadap perayu selain daripada hanya pertengkaran lisan dua minggu sebelum kejadian tikaman itu, sehingga menyebabkan perayu bersikap mempertahankan diri dengan si mati (lihat perenggan 30).

(3) Tidak ditunjukkan kenapa atau atas asas munasabah apa keterangan PW9 berkaitan kenyataan sebelum mati yang dibuat oleh si mati kepadanya patut diketepikan oleh hakim. Mahkamah memutuskan dia merupakan saksi yang boleh dipercayai dan konsisten tanpa apa-apa

dendam terpendam atau niat jahat terhadap perayu. Hakim perbicaraan tidak salah arah dari segi undang-undang atau fakta dengan meletakkan kebergantungan kepada kenyataan sebelum mati yang dibuat oleh si mati kepada PW9 yang bukan sahaja mengenal pasti perayu sebagai orang yang menyebabkan kecederaan itu, tetapi juga 'transaction' itu — tikaman itu — yang membawa kepada kecederaan yang akhirnya menyebabkan kematian si mati (lihat perenggan 41).

(4) Bahkan melalui keterangan dalam pembelaan perayu sendiri, Ria berada di dapur semasa pergaduhan antara perayu dan si mati berlaku. Siasatan oleh polis sejurus selepas kejadian sebagaimana dinyatakan oleh saksi-saksi pendakwaan adalah bahawa saksi ini berada di dapur apabila dia mendengar si mati berteriak selepas ditikam. Dalam keadaan itu, Ria bukan saksi penting kepada kejadian pada malam terseut dalam atau sekitar ruang tamu premis. Apa-apa keterangan yang diberikan olehnya tidak mungkin menyebabkan apa-apa akibat penting dalam keputusan muktamad yang dibuat oleh hakim perbicaraan dalam perkara itu (lihat perenggan 43–44).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th, 2014 Reissue) paras 288–371.

Cases referred to

Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (refd)
Chang Kim Siong v PP [1968] 1 MLJ 36, FC (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 306, FC (refd)
Karam Singh v PP [1967] 2 MLJ 25, FC (refd)
Nembhard v R [1982] 1 All ER 183, PC (refd)
PP v Magendran a/l Mohan [2005] 6 MLJ 6; [2005] 3 CLJ 592, HC (refd)
Sainal Abidin bin Mading v PP [1999] 4 MLJ 497, CA (refd)
Seraman @ Jayaraman a/l A Adipan v PP [2009] 3 MLJ 64, CA (refd)
Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)

Legislation referred to

Evidence Act 1950 ss 32(1)(a), 105
Penal Code ss 85(2), 86(2), 302

Appeal from: Criminal Case No T-45–9 of 2009 (High Court, Tawau)

Yong Pei Yi (Dicky Loh with him) (Ling Lo Yong & Zamzuri) for the appellant.
Awang Armadajaya Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Varghese George JCA:

INTRODUCTION

[1] The appeal before us was against the conviction and sentence to death by hanging, handed down by the High Court at Tawau on 18 May 2012.

The charge brought against the appellant was the following:

> That you, on 14th day of March 2009, at about 8.30 pm, at an unnumbered house, at Rancangan Kalabakan, Jalan Kalabakan, in the district of Tawau, in the State of Sabah, did commit murder by causing the death of one Andres Sumingut Jamarolin, male age 39 years, and that you have thereby committed an offence punishable under s 302 of the Penal Code.

[2] After having heard 11 witnesses, the High Court had at the close of the prosecution's case ruled that a prima facie case had been made out against the appellant. The appellant opted to give evidence on oath and was the sole witness for the defence.

[3] At the end of the trial, the learned judge held that the defence had not cast any doubt on the prosecution's case and accordingly the charge against the appellant had been proved beyond reasonable doubt.

[4] Before us, the appellant advanced three principal grounds why the finding of guilt made against him and the sentence imposed by the High Court should be reversed. They were:

(a) there was no direct evidence implicating the appellant to the commission of the crime. The learned judge was wrong in admitting and/or relying on the dying declaration or statement allegedly made by the deceased to 'PW9';

(b) the prosecution had failed to adduce a crucial witness, one Nozariah bt Talib who was at the house where the alleged stabbing of the deceased took place. Accordingly there was no evidence on how the deceased was stabbed; and

(c) there was no basis on the facts for the learned judge to hold that the 'spear' recovered (exh P18) was the murder weapon, as alleged.

[5] On 9 September 2014 we heard counsel for appellant and the learned deputy public prosecutor and having considered both their oral and written submissions, we were of the unanimous view that the high court was not in error in finding the appellant guilty as charged. Accordingly we dismissed the appeal and affirmed the conviction and sentence.

We now set-out the grounds for our decision.

BACKGROUND

[6] The deceased, Bubus (or Bobos) (aka Andres Sumingut Jamarolin) was a tenant of a room at the ground floor of the house owned by PW9 where the incident had taken place. PW9 lived on the upper floor and at about 8.30pm on 14 March 2009, she had heard a cry for help. She went down the stairs and saw the deceased holding his right chest and covered with blood.

The deceased at that point told her that 'Ray' (as the appellant was also known) had stabbed him and he needed help to go to the clinic.

[7] PW9 contacted PW7 for assistance. PW7 came over with her husband to the house in question. PW7 saw the deceased at the veranda of the house holding his right chest and he was bleeding.

PW8 who was in his house (about 100 metres away) who also came over to give assistance, found the deceased bleeding and clutching his right ribs.

[8] PW9, 'PW7' and 'PW8' then rushed the deceased in the car belonging to PW7's husband, first to Tawau Clinic and then to Tawau Hospital.

The deceased did not have any traceable pulse upon arrival at the hospital and was pronounced dead thereafter.

[9] The appellant who stayed at PW8's house (whenever he was back from the timber camp where he worked) fled the scene of the crime but was later apprehended by PW11, a police officer investigating the crime.

[10] Initial information as to the stabbing incident at Kg Rancangan Kalabakan was received by 'PW4', the officer in charge at Kalabakan Police Station. PW4 had rushed over to the scene after informing the investigation officer, 'PW10'.

[11] PW10 subsequently went over to the scene after informing his superior 'PW3', the senior investigation officer. While conducting inspection there, PW10 found a spear (exh P19A) outside the fence of that house where the stabbing had taken place.

[12] The post-mortem on the deceased was conducted on 20 March 2009 by PW1, the forensic pathologist, in the presence of PW3. The deceased was identified by his wife.

It was 'PW1's' finding that the cause of death was hypovolaemic shock (due to massive loss of blood) as a consequence of the stab wound on the right front of

A the chest which pierced the right lung, liver and colon. The stab wound injury suffered by the deceased was fatal and consistent with that caused by a sharp weapon probably one which had a double edge such as a *keris* or spear. It was also PW1's opinion that it was unlikely that the deceased could have been saved if he was brought to hospital earlier.

B

[13] The appellant in his defence claimed that on the fateful evening he had been drinking with PW8 and some friends at PW8's house. He had then gone over to the PW9 to see a lady known as 'Ria' (Nozariah bt Talib) and was then invited by the latter to join for dinner. 'Ria' was preparing dinner, when allegedly the deceased, who was earlier seated on a sofa watching TV, left the room but then returned suddenly and attacked him.

C

According to him, he then grabbed a piece of wood to defend himself from the deceased when he (the appellant) was pushed against a wall. He was then chased out of the house and he threw away the piece of wood.

D

[14] The appellant's version was essentially that he had been merely defending himself. He denied he went there armed with a spear with intention to find the deceased. The appellant did confirm that he had seen a spear at PW8's storeroom (although he initially denied having seen the spear before or taken it from there). Nevertheless he agreed the spear was a sharp weapon that could cause serious injury to a person.

E

F **[15]** The appellant however disagreed that he ran away after stabbing the deceased. His answer, as highlighted by the learned judge was that he could not remember the events that had happened to him after the incident at PW9's house.

G **[16]** As also highlighted by the learned judge in the judgment:

> Instead of denying, the accused (the appellant) testified that he cannot remember when it was put to him that he was the one who stabbed the victim with a spear.

H **[17]** In his evidence the appellant also stated that PW9 was his girlfriend and PW9's mother had scolded him about an affair the appellant had been having with PW9. It was claimed that PW9 was the one who had told the appellant that it was the deceased who informed PW9's mother about the relationship between the appellant and PW9.

I

It was admitted by the appellant that about two weeks before the stabbing incident, there was a verbal quarrel between the appellant and the deceased about this matter. This was confirmed by PW9 when she was cross-examined.

[18] Despite the appellant's claim that he was forced to stab the deceased with the wood when he was pushed against the wall by the deceased, the ensuing police investigation revealed that there were no blood stains found at the wall, where allegedly this had occurred.

Blood stains were found only on the sofa in the room. The post-mortem revealed that the stabbing had been inflicted from the top downwards along the front right chest of the deceased indicating that the deceased was in all probability still in a sitting position when the stabbing took place.

JUDGMENT OF THE HIGH COURT

[19] At the close of the prosecution case, the learned judge had analysed the evidence led before the court and held that the essential ingredients to prove a charge of murder under s 302 had been made out. On the authority of *Sainal Abidin bin Mading v Public Prosecutor* [1999] 4 MLJ 497 (CA), the learned judge identified the four ingredients that were required for a conviction, namely:

(a) that the victim died;

(b) that the victim died as a result of injuries sustained by him;

(c) that the injuries of the victim were caused or were the result of the acts of the accused; and

(d) that in inflicting the injuries upon the victim, the accused caused them with the intention of causing bodily injuries and such bodily injuries were sufficient in the ordinary course of nature to cause death.

[20] One issue raised at that stage of the proceedings was as to the identity of the deceased considering that there had been differences in the way the victim had been addressed or known. In respect of this issue the learned judge's finding was expressed in the following manner:

> The court is of the view that the *fact of identification by the victim's wife to PW1* which is the usual mode of identification by relatives conducted at hospitals is adequate. The court would invoke the maxim *omnia praesumuntur rite acta* (all acts are presumed to have been rightly and regularly done) under s 114(e) of the Evidence Act 1950 regarding the identification of the body of the victim by the victim's wife to PW1 before she would commence her post-mortem on the victim.
>
> There is also positive confirmation of PW6 and later by PW7, PW8 and PW9 who knows the victim from the photos (exh P11) that the victim is none other than Bubus or Bobos otherwise identified as Andres Sumingut Jamarulin are in the court's view sufficient identification of the victim to satisfy the prosecution's burden for proving it beyond reasonable doubt.

[21] The learned judge also was satisfied that the deceased had died as a result of the injuries sustained based on the testimony of PW1 (the forensic pathologist) and the post-mortem report (exh P5). As per this evidence, the major and critical injury suffered by the deceased was a stab wound measuring between 2.7 x 1.4cm (about 3cm long when the margins were closed) oriented vertically on the right outer front of the chest about 17.5cm to the right of midline and along 125cm above the heel. Both the ends of the wound were sharply cut. The wound was directed to the left and downward cutting the underlying intercostal muscle, the sixth ribs, the lower lobe of the right lung, the right hemi-diaphragm, the liver, the omentum and hepatic fixture of the colon. The estimated depth of the wound was 16.5cm. This stab wound injury suffered by the deceased was fatal.

[22] On this issue, the court went on further to state:

> The court accepts that the evidence of PW6 (clinic assistant), PW7, PW8 and in particular PW9 sufficiently establishes the victim's critically dire state after the stabbing during the ride to the clinic and finally to the hospital. There is no question from the evidence adduced that the victim had died at the latest just before or on his arrival at the hospital when attempts there to resuscitate him failed because of hypovolaemic shock due to or in consequence of stab wound inflicted to the chest of the victim as testified by PW1.
>
> The defence in cross-examination of PW1 had not been able to discredit her conclusions and the court finds that the prosecution had proven beyond reasonable doubt that the victim died because of the injuries from the stab would sustained by him as described in the post-mortem report (exh P5).

[23] In addressing the third ingredient, the learned judge held that through circumstantial evidence it had been proven that the injuries sustained by the deceased were caused by the appellant, who was known to PW8 and PW9 as 'Ray'. The dying declaration or statement made by the deceased to PW9 identifying 'Ray' as the person who had stabbed the deceased was accepted by the court. The deceased had gone on further a little later (after seeking assistance to go to the clinic) to also say to PW9 'I do not know what I have done wrong'; this the court held showed that the deceased was still aware and lucid of what he was doing and was not under any shock or delusion when the statements were made.

[24] The learned judge went on the state as follows:

> The court accepts that the evidence of PW9 was also consistent throughout the trial and neither had it been shown that she harboured any grudges against the accused who is her friend.
>
> The court accepts that the victim's statement in pointing out that it was Ray (the accused) as the person responsible for the injury he sustained which later resulted in his death is not a fact which was created by the victim nor the prosecution witnesses.

[25] The prosecution case had also shown that the appellant was the last person together with the deceased and the spear, (exh P19A) seized by PW10 outside the fence of PW9's house at the crime scene on the same day, matched the description of the possible murder weapon (as opined by PW1).

[26] The court held that these aforesaid evidence led to the irresistible inference and reasonable conclusion that the appellant had caused the injuries suffered by the deceased. In coming to that conclusion, the court noted that the law did not require a dying declaration to be corroborated by any other evidence.

[27] As regard the requirement that the prosecution had to also prove that the appellant had the intention of causing the victim's death or had such intention to cause such bodily injuries as the appellant knew was likely to cause the death of the deceased as a natural consequence, the court observed that such intention had to be inferred from the appellant's acts and surrounding circumstances. The court referred to the leading authorities on this area of the law and stated:

> In *Sainal Abidin bin Mading v Public Prosecutor* [1999] 4 MLJ 497 the Court of Appeal held as follows:
>
> > Intention is a matter of inference ... After considering the nature of the injuries sustained by the deceased, the number of wounds and the weapon used, the trial judge had correctly regarded the nature of the injuries sustained by the deceased as an indicator of intention.
>
> The case of *Public Prosecutor v Sanin Othman* [2011] 1 CLJ 626 is another illustration of inference of intention from the nature of the wound:
>
> > [19] Since it is no easy task to establish the ingredient of intention it thus has to be established by inferences arrived at from the evidence made available. The evidence before the court was more than ample to establish that ingredient. To reiterate, the two injuries were caused by a dangerous instrument ie, a knife. The injuries were deep and never mere slash wounds. With such wounds, which must have required great force, it would defy logic that the respondent did not intend to kill or cause serious injury on the deceased (*Tan Buck Tee v Public Prosecutor*.

[28] With respect to the nature of the weapon used and intention, the learned judge stated:

> All indications points to the accused as establishing his intention and motive to cause injury with the spear which is a dangerous weapon. In the Federal Court in the case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 it was stated that intention is a matter of inference and went on to observe at p 176 thus:
>
> > The deliberate use by some men of dangerous of weapon at another leads to the irresistible inference that their intention is to cause death.

[29] There were two defences raised by the appellant when his defence was called. They were 'drunkenness' and 'provocation'.

With regard to the first defence, the court found that the drinking (by the appellant) was voluntary and with the other surrounding evidence, were insufficient to establish a defence of intoxication under ss 85(2) and 86(2) of the Penal Code. The appellant had also failed, it was held, to discharge the onus placed upon him under s 105 of the Evidence Act 1950 to prove the state of intoxication such as to negate the appellant's intention or mens rea to cause the fatal injury the deceased had succumbed to.

[30] As to the second defence it was noted by the learned judge that there was no evidence that the deceased had made any threats against the appellant (other than a mere verbal quarrel two weeks before the stabbing incident), such as to cause the appellant to be defensive with the deceased.

It was further held by the learned judge as follows:

> The accused has failed the test for establishing provocation as set in the Supreme Court case of *Lorensus Tukan v Public Prosecutor* [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162, where Seah SCJ said:
>
> > The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see *Nanavati v State of Maharashtra* AIR 1962 SC 605, 530).
>
> The court finds that there was no evidence of provocation or sudden attack from the victim sufficient as to give sufficient cause for the accused to stab the victim with the spear while he was sitting in front of the TV. Blood stains on the sofa and none at the wall confirms this (see sketch plan exh P22(A4) and photos exh P12(6 and 8).

[31] The court also made reference to the following important aspects of the sworn evidence of the appellant in defence:

(a) he had subsequently admitted that he had seen the murder weapon, the spear, in the store room of PW8's house, where he stayed from time to time;

(b) on the fateful day he had indeed gone over to PW9's house;

(c) he had been told by PW9 that the deceased was the one who had reported about his relationship with PW9 to PW9's mother, which had led to the appellant being scolded by PW9's mother;

(d) there was a verbal quarrel between him (the appellant) and the deceased about two weeks prior to the stabbing incident at PW9'2 house on 14 March 2009; and

(e) when he went to PW9's house, the deceased was seated on a sofa, watching TV.

[32] The learned judge in his judgment set-out the following excerpts for the appellant's evidence in defence:

DW1: I tried to defence myself as Bubus tried to punch me again. I got hold of a wood near where I was pushed aside.

DC: When you said you were pushed aside, were you pushed against the wall?

DW1: Yes, I was pushed against the wall.

DC: From where do you get the wood?

DW1: Near the wall where there is a cabinet, indicated on Exhibit D1 right hand side from where he marked 'X', the place where he got the piece of wood.

DC: Then what happened?

DW1: I got hold of the wood and pushed it at Bubus because be was trying to punch me again.

...

...

DW1: I don't know what happened by everybody in the house were making noise and chased me out from the house, after that I went out from the house and carried the wood and threw it somewhere because I don't know that it was a spear. I thought it was only a piece of wood.

...

...

DC: You said you went out of the house and threw away the wood, before you threw away the wood did you examine what it was?

DW1: No I threw away.

DC: Before you left the house, do you know what happened to Bubus?

DW1: I don't know.

DC: You said earlier on that the police informed you were arrested for the death of Bubus. Do you remember causing any injury to Bubus?

DW1: I remember maybe because of the wood that I pushed against Bubus.

...

A …

DC: You have testified in court of what happened on the night of the incident, do you have anything else to say to the court in your defence?

B DW1: No. I have no intention to kill Bubus. I was only defending myself against Bubus because he was bigger size than me. I have no intention to kill him because we were friends.

DC: Why you have to defend yourself?

C DW1: I was defending myself because Bubus was punching me and when he was stabbed, it was not my intention to stab him.

[33] The leaned judge held that in all the circumstances the defence's attempt '… to set up the defences of drunkenness, provocation, sudden fight, D self defence and excessive self-defence (was) not supported by the facts adduced by DW1 (the appellant). The Accused's (appellant's) defence has not been able to cast any doubt on the prosecution's case'.

BEFORE US AND OUR DECISION

E

[34] Before us the defences of intoxication, provocation/sudden fight and self-defence raised at the trial were no longer pursued by the appellant.

This appeal was confined by the appellant to the three grounds as enumerated at para 4 above of this grounds of decision.

F

No direct evidence/court was wrong in admitting the dying declaration

[35] The question before us was whether the learned judge was wrong in G admitting and relying on the dying declaration made by the deceased to PW9 to the effect that he (the deceased) had been stabbed by the appellant.

It needs to be reiterated at the outset that the learned judge in evaluating the immediate statement made by the deceased to PW9 on the stairs, noted that H this statement was made when the deceased was lucid, meaning that it was *not* made in any state of delusion impairing his cognitive faculties. In support of this there was also the further statement by the deceased made to PW9 — 'I do not know what I have done wrong' which clearly indicated that the deceased was at the material time mentally alert and fully conscious.

I

[36] Section 32(1)(a) of the Evidence Act 1950, in so far as it related to dying declaration provides as follows:

> 32 Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.

(1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

(a) when the statement is made by a person as to the cause of this death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such a statement is relevant whether the person who made it was or was not at the time when it was made under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;

(b) ...

(c) ...

[37] It has been accepted in our law that the scope of that provision is wider than the common law rule where a 'dying declaration' must relate exclusively as to the cause of the death itself. In our law, the statement in question may relate to the cause of his death *or as to any of the circumstances of the transaction which resulted in this death*; such statement should however not be remote in point of time.

In *Evidence Practice and Procedure* by Augustine Paul (3rd Ed), (at p 329) the learned author (and a former judge of the Federal Court) has instructively noted as follows:

... it is to be borne in mind that the local law as to dying declarations is materially different from the law in England. By section 32 of the Evidence (Ordinance) statements by a deceased person as to the circumstances of the transaction which resulted in his death are admissible irrespective of whether the person who made them was or was not at the time when they were made under expectation of death.

[38] It is also the law here that such a dying declaration or statement need not be corroborated by some other evidence. The same learned commentator in *Evidence, Practice and Procedure* above cited, goes on at p 335 to state:

A dying declaration does not need corroboration.

In *Nembhard v R* [1982] 1 All ER 183, the Privy Council rejected an argument that a dying declaration must be corroborated if it is to be relied on. In *State of Uttar Pradesh v Chet Ram & Ors* [1990] 1 CLJ 1079 the Indian Supreme Court said that a dying declaration, needless to say, does not require any corroboration as in the case of the evidence of an accomplice or a confession. However, where the deceased who made the dying declaration is an accomplice then corroboration of his evidence is

desirable and necessary (See Hill JA in *Mary Shim v Public Prosecutor* [1962] 1 MLJ 132, at p 134 (CA)).

[39] In his written submission the learned deputy public prosecutor, Tuan Awang Armadajaya bin Awang Mahmud had dealt with the aforecited opinion of the Privy Council in *Nembhard v R* [1982] 1 All ER 183 and we consider it appropriate to reproduce that part of the submission in extenso here:

> In *Nembhard v R*, the appellant was charged in Jamaica with the murder of a police officer. The evidence for the prosecution was that the deceased had been shot at the gate of his home and that there were no eyewitnesses, but that when his wife heard the shots and ran out to him from the house, he told her that he was going to die, that she was going to lose her husband and that the appellant had shot him. He died a few hours later. The trial judge admitted the evidence of the wife as to her husband's statement on the basis that it was a dying declaration. There was no other evidence which implicated the appellant. In his summing up, the trial judge told the jury that they must be satisfied as to the reliability of the wife and that, if so satisfied, they must also assess the probative value of the dying declaration itself, bearing in mind that it had not been tested by cross-examination, but he did not tell the jury that it was dangerous to rely on a dying declaration in the absence of corroboration. The appellant was convicted and his application for leave to appeal against conviction was dismissed by the Court of Appeal of Jamaica. The appellant appealed to the Privy Council, contending that the jury should have been directed that it was dangerous to convict of murder solely on the evidence of a dying declaration with no supporting or corroborating evidence and that, no such direction having been given, the appellant's conviction was unsafe and should be quashed.
>
> In dismissing the appeal, the Privy Council held *that 'there was no rule or law or practice whereby a special warning about the absence of corroborative evidence had to be given where the only evidence implicating the accused consisted of a dying declaration, and that the trial judge had discharged his general duty to leave the jury with a clear consciousness of the need for care in assessing the significance of a dying declaration*'.
>
> At pages 185, 186–187, Sir Owen Woodhouse expressed the following opinion on the unlikeliness of falsehood in a dying declaration, and on caution in admitting statements of dead person:
>
> > It is no difficult to understand why dying declarations are admitted in evidence at a trial for murder or manslaughter and as a striking exception to the general rule against hearsay. For example, any sanction of the oath in the case of a living witness is thought to be balanced at least by the final conscience of the dying man. Nobody, it has been said, would wish to die with a lie on his lips. So it is considered quite unlikely that a deliberate untruth would be told, let alone a false accusation of homicide, by a man who believed that he was face to face with his own impending death. There is the further consideration that it is important in the interests of justice that a person implicated in a killing should be obliged to meet in court the dying accusation of the victim, always provided that fair and proper precautions have been associated with the admission of the evidence and its subsequent assessment by the jury. In that regard, it will always be necessary

> for the jury to scrutinize with care the necessarily hearsay evidence of what the deceased was alleged to have said both because they the problem of deciding whether the deponent who has provided the evidence can be relied on and also because they will have been denied the opportunity of forming a direct impression against the test of cross-examination of the deceased's own reliability.
>
> It appears that a rule of practice has been developed that when a dying declaration has been the only evidence implicating an accused person, a conviction usually cannot be allowed to stand where there had been a failure to give a warning on the necessity for corroboration: see for example *Pius Jasunga s/o Akumu v R* (1954) 21 EACA 331 and *Terikabi v Uganda* (1975) EA 60. *But it is important to notice that in the countries concerned, the admissibility of a dying declaration does not depend on the common law test, that is on the deceased having at the time a settled hopeless expectation of impending death. Instead, there is the very different statutory provision contained in* s 32(1) of the Indian Evidence Act 1872. That section provides that statements of relevant facts made by a person who is dead are themselves relevant facts ... In *Akumu*, it pointed out that the weight to be attached to a dying declaration admitted under the common law rules. The first kind of statement would lack that special quality that is thought to surround a declaration made by a dying man who was conscious of his condition and who had given up all hope of survival. Accordingly, it may not seem surprising that the courts dealing with such statements have felt the need to exercise even more caution in the use to be made of them than is the case where the common law test is applied. (Emphasis added.)

[40] This position in law has been reaffirmed by our Court of Appeal in the recent case of *Seraman @ Jayaraman a/l A Adipan v Public Prosecutor* [2009] 3 MLJ 64, where the deceased had made the 'statement' to several persons. The Court of Appeal endorsed the learned High Court judge's finding there in that case that so long as it could be determined that the deceased had made it and that he had the 'capacity and clarity' of mind, it was absolutely safe to accept the oral or written statement of a deceased as to the cause of his death *or to any circumstances of the transaction which resulted in his death*.

(The aforesaid Court of Appeal decision has since been affirmed by the Federal Court.)

[41] It was not shown to us why or on what reasonable basis PW9's testimony relating to the dying statement made by the deceased to her ought to have been disregarded by the learned judge. The court had held her to be a reliable and consistent witness without any predisposed grudge or ill will against the appellant.

We were of the view therefore that the learned judge had not misdirected himself in law or on the facts in placing reliance on the dying statement made by the deceased to PW9 which not only identified the appellant as the person

who inflicted the injuries, but also the 'transaction' — the stabbing — that led to injuries that subsequently resulted in the deceased's death.

Non-availability of Nozariah as a witness

[42] It must be pointed out that the prosecution had informed the court that reasonable attempts had been made to trace this witness but she could not be located. This was not a situation therefore where it could be imputed that the prosecution was suppressing the evidence of this witness, for any adverse inference to be drawn.

[43] More importantly however, even by the appellant's own evidence in defence, this witness (Ria) was in the kitchen (preparing dinner) when the admitted scuffle between the appellant and the deceased had taken place.

The investigation by the police immediately after the incident as disclosed by the prosecution witnesses was that *this witness was in the kitchen when she heard the deceased crying out* after being stabbed.

[44] In the circumstances, we did not see how Nozariah bt Talib was a critical or crucial witness to the happenings at that night in or about the living room of the premises. Any evidence she would have given would not have had any material consequence on the ultimate decision reached by the learned judge in the matter.

[45] The question then was whether there was sufficient *circumstantial evidence* to implicate the appellant with the stabbing of the deceased using a dangerous weapon, as established by the post-mortem report and evidence of PW1.

This was best dealt with together with the third ground in appeal raised by the appellant before us.

The spear (eh P18) as the murder weapon

[46] It was the contention of the appellant that there was no basis for the learned judge to hold that the 'spear' (exh P19A) was the murder weapon used by the appellant.

[47] The learned judge in his analysis of the evidence led before the High Court, especially the appellant's testimony in defence, highlighted the fact that the appellant had not denied that:

(a) the appellant was at the scene of the crime at the material time when the deceased suffered the stab wound injuries;

(b) the appellant had used a 'wood' to 'push against' the deceased (according to the appellant's version);

(c) the appellant had thrown away the 'wood' at about the place where subsequently the 'spear' was recovered from;

(d) the appellant had fled the scene until he was apprehended later at another place in the same locality; and

(e) that he was aware that there was a spear at PW8's store room.

The learned judge also in his judgment noted that the appellant was evasive and inconsistent in his testimony with regard to the use of the 'wood' and events subsequent to the incident when he was cross-examined by the prosecution.

[48] In our evaluation of the judgment of the learned judge, we found that that the learned judge had directed himself correctly as to the law on circumstantial evidence as the basis for the conviction. The learned judge stated:

> In respect of the law on circumstantial evidence, reference is made to what has been state by Abdoolcader FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 275 as follows:
>
> > Where circumstantial evidence is the basis of the prosecution case, the evidence proved must irresistibly point to one and only conclusion, the guilt of the accused, but in the case tried without a jury the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306).

[49] The principles governing the acceptance of circumstantial evidence to convict an accused have been laid down in numerous cases including *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306; *Public Prosecutor v Magendran a/l Mohan* [2005] 6 MLJ 6; [2005] 3 CLJ 592; *Chan Chwen Kong v PP* [1962] 1 MLJ 307; *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25; *Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36.

The principle gleaned from those authorities was that a conviction based on circumstantial evidence was good in law if the cumulative effect of all evidence leads to an irresistible conclusion that it was the accused who committed the crime.

[50] Suffice it here to reproduce some guiding excerpts from the aforecited authorities, to support that position.

In *Sunny Ang*'s case (where the deceased's body was never found) the Federal Court noted:

> ... The second question to which I must draw your attention is that in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example — was it accident?

Thomson CJ's comments in *Chan Chwen Kong* were in the following terms:

> ... where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

In *Karam Singh*, HT Ong FJ stated:

> ... In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused ...

And in *Chang Kim Siong*, the Federal Court emphasised that:

> The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient.

[51] There was on the totality of the evidence before the trial court therefore sufficient circumstantial evidence to hold, firstly, that the appellant had used the 'spear' to stab the deceased and secondly, that the injuries inflicted by the appellant using the spear was the direct cause resulting in the death of the deceased.

CONCLUSION

[52] For the reasons discussed above, we were not convinced that the learned judge had committed any error on the facts or in law or that the conviction and sentence was not safe in all circumstances of the evidence before the High Court.

There was no valid reason shown for us to interfere with the conviction and sentence and accordingly, we were unanimous in dismissing this appeal.

Appeal dismissed and conviction and sentence affirmed.

Reported by Afiq Mohamad Noor